86-778

Supreme Court, U.S.
FILED
OCT 21 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHARLENE McCOLLUM, TONY D. McCOLLUM, and
TIMOTHY D. McCOLLUM,

Petitioners,

v.

WILLIAM F. BOLGER, Postmaster General,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

WILLIAM D. MALLARD, JR.
MALLARD & MINOR
2900 Chamblee-Tucker Rd.
Building 6
Atlanta, Georgia 30341
(404) 457-9077
Attorney for Petitioners

QUESTIONS PRESENTED

Did the District Court and Court of Appeals err in determining that personal animosity between the supervisor and complaining employees and members of the complaining applicant's family is a legitimate nondiscriminatory reason for employment discrimination so as to rebut Petitioners' prima facie case of sex discrimination?

Did the District Court and Court of Appeals err in determining that Petitioner, Tony McCollum, did not prove a prima facie case of sex discrimination and retaliation?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceedings below were the Petitioners, Charlene McCollum, Tony McCollum, and Timothy McCollum, Plaintiffs below, and William F. Bolger, George T. Howard, the United States Postal Service and the National Rural Letter Carriers Association, Defendants below.

NOTICE OF BELIEF THAT PARTY BELOW LACKS INTEREST IN THE OUTCOME

Pursuant to rule 19.6 of the Rules of the Supreme Court of the United States, notice is hereby given that petitioners believe that the United States Postal Service, George T. Howard and the National Rural Letter Carriers Association, defendants below, have no interest in the outcome of this petition. Petitioners have not sought herein review of the judgments below in favor of these parties. Only petitioners' Title VII claims against the Postmaster General in his official capacity are the subject of this Petition.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
PARTIES TO THE PROCEEDINGS BELOW ii

NOTICE OF BELIEF THAT PARTY BELOW LACKS INTEREST IN THE OUTCOME iii

TABLE OF AUTHORITIES vi

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Course of Proceedings in the Court Below 3

B. Statement of Facts 5

C. Existence of Jurisdiction in the Court Below 8

REASONS FOR GRANTING THE WRIT 9

I. THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT PERSONAL ANIMOSITY BETWEEN THE SUPERVISOR AND COMPLAINING EMPLOYEES AND MEMBERS OF THE COMPLAINING APPLICANT'S FAMILY IS A LEGITIMATE NONDISCRIMINATORY REASON FOR

EMPLOYMENT DISCRIMINATION SO AS TO REBUT PETITIONERS' PRIMA FACIE CASE OF SEX DISCRIMINATION 9

II. THE DISTRICT COURT AND THE COURT OF OF APPEALS ERRED IN DETERMINING THAT PETITIONER TONY McCOLLUM DID NOT MAKE A PRIMA FACIE CASE OF SEX DISCRIMINATION AND RETALIATION 11

CONCLUSION 13

APPENDIX
(Printed Separately)

1. Opinion of the United States Court of Appeals for the Eleventh Circuit ..... App. 1

2. Opinion of the United States District Court for the Northern District of Georgia ..... App. 17

3. Judgment of the United States Court of Appeals for the Eleventh Circuit ..... App. 86

TABLE OF AUTHORITIES

Cases Page

Bibbs v. Block, 749 F.2d 508 (8th Cir.1984) 13

McCarthy v. Cortland County Community Action Program, 487 F.Supp. 333 (N.D.N.Y. 1980) 12

Slotkin v. Human Development Corp. of Metropolitan St. Louis, 454 F.Supp., 250 (E.D.M. 1978) 13

Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981) 9,10

United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983) 10

Womack v. Munson, 619 F.2d 1292 (8th Cir. 1980) 12

Statutes

28 U.S.C. 1254(1) 2

28 U.S.C. 1291 8

42 U.S.C. 2000e-16(c) 2,8

No.

In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

CHARLENE McCOLLUM, TONY D. McCOLLUM, and
TIMOTHY D. McCOLLUM,

Petitioners,

v.

WILLIAM F. BOLGER, Postmaster General,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Charlene McCollum, Tony McCollum and Timothy McCollum hereby petition that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered on July 23, 1986.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Eleventh Circuit was entered on July 23, 1986 (Nos. 85-8680, 85-8681 and 85-8682). The opinion, which is contained in the Appendix at page 1, is reported at 794 F.2d 602 (11th Cir.1986). The opinion of the United States District Court for the Northern District of Georgia, which is not reported, is contained in the Appendix at page 17. The judgment of the United States Court of Appeals is contained in the Appendix at page 86.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 23, 1986 affirming judgment against petitioners entered by the United States District Court for the Northern District of Georgia on July 26, 1985.

The jurisdiction of this Court is invoked under and pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATONS INVOLVED

Section 2000e-16(c) of 42 U.S.C. provides:

'Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination

based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, executive order 11478 or any succeeding executive orders, or after 180 days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

STATEMENT OF THE CASE

A. Course of Proceedings in the Courts Below

Petitioners' cases against the Postmaster General, the Postal Service and Postmaster George T. Howard arise out of discrimination complaints filed with the Postal Service in 1981. Charlene McCollum, a rural carrier employed at the Rome, Georgia Post Office, filed two sex discrimination complaints because of the reduction of her rural route, and consequently of her salary, and because of her removal from employment. (Record on Appeal, Vol. 1, pp. 1-4). By means of a union grievance procedure, the termination was later converted to a 78-day suspension. R1-1-3, 34. When the discrimination complaints had been pending for over 180 days without a final decision by the Postal Service, Charlene McCollum filed suit in the United States District Court for the Northern District of Georgia on April 6, 1983. R1-1-1, 4.

Petitioner Tony McCollum, son of Charlene McCollum and also a rural carrier at the Rome Post Office, filed a discrimination complaint in 1981 based on sex discrimination and reprisal. R4-1-1, 3. The

incidents complained of were improper reduction of Mr. McCollum's work week, assignment of an off day so as to deny Mr. McCollum a normal two-day weekend and issuance to Mr. McCollum of a warning letter for failure to follow instructions. R4-1-2, 3. On June 3, 1983, an administrative decision unfavorable to petitioner was issued by the Postal Service and, on July 1, 1983, he filed suit in the United States District Court for the Northern District of Georgia. R4-1-1, 3.

Petitioner Timothy McCollum, another son of Charlene McCollum, took and passed an examination for employment with the Postal Service in 1979. R8-1-1. In 1981, Timothy McCollum learned that the Postmaster in Rome had passed over him for employment and selected a female applicant who was less qualified than he for a position in the Rome Post Office. R8-1-2. Mr. McCollum then filed a sex discrimination complaint, which complaint was rejected by the Postal Service. R8-1-2. Mr. McCollum then filed suit in the United States District Court for the Northern District of Georgia on March 25, 1982. R8-1-1. That Court remanded the case to the Postal Service with directions to accept and investigate the complaint. R8-10. After the administrative complaint had been pending before the Postal Service for over six months after the remand, the case was reinstated in the District Court. R9-17.

The complaint of Charlene McCollum against Postmaster George T. Howard individually was dismissed by the District Court on March 26, 1984. R2-26. The complaint of Tony McCollum against the Postal Service was dismissed by the District Court on December 30, 1983 for lack of subject matter jurisdiction. R4-11.

The case of Charlene and Tony McCollum against the National Rural Letter Carriers Association was based on failure to represent them in various disagreements with Postal Service management, a failure which petitioners contended was due to union officials' hostility toward petitioners. R1-1-5, 4; R4-9-2.

The cases of all three petitioners were consolidated and tried by the United States District Court for the Northern District of Georgia in May, 1985. On July 26, 1985, that Court entered its decision in

favor of appellees. R3-40. Notices of Appeal were filed by all three petitioners on August 22, 1985. R3-42,7-44,9-28.

The United States Court of Appeals for the Eleventh Circuit entered judgment affirming the judgment of the United States District Court on July 23, 1986. Only petitioners' Title VII claims against the Postmaster General in his official capacity are the subject of this petition.

B. Statement of Facts

For a number of years there has been evident hostility between Charlene McCollum and George T. Howard, the Postmaster in Rome. Mrs. McCollum traces the beginning of this hostility to a 1976 incident involving the filling of an auxiliary rural route. According to the National Agreement then in effect between the Postal Service and the National Rural Letter Carriers Association, the position was to be given to the senior substitute rural letter carrier, at that time Charlene McCollum. Mrs. McCollum contended that Mr. Howard wanted to give the route to another and younger female and that bad feelings began when he was required by the National Agreement to give the route to Charlene McCollum. R3-40-13.

The Postmaster dates the beginning of the hostility between himself and Charlene McCollum to his refusal to hire Timothy McCollum and Vickie Dorsey, children of Charlene McCollum. R3-40-12. The evidence in this case shows numerous confrontations between Charlene McCollum and the Postmaster, culminating in the 1981 incidents giving rise to her discrimination complaints. R3-40-15, 18, 21, 24.

One of Charlene McCollum's two discrimination complaints was filed because of a reduction in her rural route with a consequent reduction in pay. After the route reduction, her pay was less than that of four male rural carriers, including one whose route was evaluated and reduced at the same time

as Charlene McCollum's evaluation and reduction. Appendix p. 9. The pay of the carriers involved should have been based on length of route and box factor, a figure based on the volume of mail and number of boxes served. R3-40-22. The box factor and mileage of Mrs. McCollum's route was greater than that of the four male rural carriers. Appendix 9.

Charlene McCollum's second discrimination complaint was based on her removal from Postal Service employment for alleged insubordination and failure to follow instructions. R3-40-24. After a grievance filed by the National Rural Letter Carriers Association, the removal was converted to a 78-day suspension. R3-40-30. The evidence before the District Court indicated that Mrs. McCollum was treated more harshly than similarly situated male employees at the Rome Post Office. Appendix 11.

The Court of Appeals concluded that Mrs. McCollum established a prima facie case of sex discrimination on both her complaints. Appendix 11. That Court also concluded that the respondent rebutted the prima facie case. With regard to the suspension, the rebuttal was by showing that her suspension was based in part on the fact that she had a bad relationship with her supervisor and did not get along with him. Appendix 11.

Beginning in March 1981 and extending for several months thereafter, Tony McCollum represented his mother in her discrimination complaints. R3-40-50. Tony McCollum met with the Postal Service EEO counselor about his mother's complaints on March 25, April 9 and April 20, 1981. The counselor met with Mr. Howard regarding the complaints sometime between March 25 and April 9 and again on May 4, 1981. R3-40-50. Mr. Howard testified that he did not know Tony McCollum was representing his mother but that he would not have been surprised to learn such. R3-40-50.

Tony McCollum's discrimination complaints arose out of a situation which occurred while he was temporarily carrying his mother's route during her suspension. For the first few weeks, he carried the route six days per week, earning overtime pay for the sixth day each

week. In May 1981, the Postmaster reduced Tony McCollum's work week to five days by assigning him a substitute on Wednesdays. R3-40-44.

A female rural carrier, Dorothy Hubbard, served a vacant route in 1979-80 for approximately eight months without a substitute except for a two or three day period when she was sick. Another female carrier, Faye Evans, served a vacant route for five months, the first three and one-half without a substitute. When she did receive a substitute, it was at her own request and was on Saturdays. When a third female carrier was assigned a substitute, it was also for Saturdays. R3-40-48, 49.

The Postmaster stated that he had never chosen the off day for any substitute except Tony McCollum, that he usually lets carriers pick their own day but that he "just didn't have the time" to let Tony McCollum pick his off day. Mr. Howard also stated that he could have given Tony McCollum Monday off. R3-40-49.

Mr. McCollum filed a discrimination complaint about the assignment of a Wednesday substitute and also about the issuing to him of a letter of warning for reporting to work on the first day a substitute was scheduled to work. The grounds for the complaint were sex discrimination and reprisal for his assisting his mother in her discrimination complaints. R4-1,-2, 3.

Mr. McCollum testified that he was not told of the assignment of a substitute by Postal Service management but rather only by the assigned substitute. R3-40-45. He did receive a certified letter on the post office workroom floor which he refused and which was determined to have contained instructions about the assignment of a substitute. R3-40-44. Mr. McCollum subsequently appeared for work on the day a substitute was assigned to work and was given a letter of warning by the Postmaster for failing to follow instructions. R3-40-46, 47.

In 1979 Timothy McCollum, another son of Charlene McCollum, took and passed an examination for employment with the Postal Service and was placed on a register of persons eligible for employment

as substitute rural carriers at the Rome Post Office. On his application for employment, Timothy McCollum answered no to the question as to whether he had any relatives working for the federal government. At that time his father was Postmaster at Armuchee, Georgia and his mother and brother were employed as rural carriers at the Rome Post Office. He testified that he answered the question as he did because he was under the impression that, since the Postal Service had now become an independent agency, it was no longer part of the federal government. Vickie Dorsey, sister of Timothy McCollum, answered this question in the same manner. R3-40-62.

Mr. Howard notified both Timothy and Vickie that they were disqualified for employment because of falsification of application. R3-40-63. The evidence herein indicates that they were actually never disqualified or removed from the hiring register and that officials of the Atlanta Sectional Center and the Office of the Postmaster General did not consider it proper that they be disqualified. R3-40-63, 64. In addition, Timothy McCollum received a February 26, 1982 letter from the Atlanta Sectional Center informing him that the substitute rural carrier register that he was on was being consolidated with the regular rural carrier register and giving him the opportunity to remain on the new register. R3-40-64.

Prior to the July 1981 National Agreement change establishing RCR employees, substitutes were hired from hiring worksheets forwarded to the Postmasters by the Atlanta Sectional Center. Persons were listed on the worksheets in order of eligibility, and Postmasters were instructed to hire from the top of the list or have a good reason for not doing so. On at least one occasion in the past, Mr. Howard has hired from the top of a hiring worksheet. R3-40-65.

Timothy McCollum appeared in the Number 1 position on a January 12, 1981 worksheet sent to the Rome Post Office by the Atlanta Sectional Center. Mr. Howard testified that he sent a call-in notice to Mr. McCollum and that he did not respond. Mr. McCollum testified that he never received such a notice. The Postmaster further testified that he sent Timothy McCollum a call-in notice because the regulations required it, and he would not have hired him if he had re-

sponded. R3-40-65, 66.

There was also a Supplemental Register dated January 12, 1981 containing eight names. Again Timothy McCollum was ranked first. The Postmaster selected a female, Deborah Bohannon, ranked and listed eighth on that register. Mr. Howard testified as to why he passed over all the other names on the register and hired Ms. Bohannon, advancing what the District Court considered legitimate reasons for doing so. R3-40-66.

The last substitute rural carrier hired before Ms. Bohannon had been Faye Evans, a female, hired in early 1980. At that time, two females, Dot Hubbard and Chloe Dollar, who had been hired on an emergency basis rather than from a register, were working as substitute rural carriers, where they remained until becoming RCR employees after the July 1981 contract change. R3-40-66.

Mr. Howard testified as to several reasons for not hiring Timothy McCollum: falsification of application, impossible to work with or around, too many members of one family at one post office, failure to respond to call-in notice. Timothy McCollum testified that Mr. Howard's actions may have been motivated in part by Mr. Howard's dislike of the McCollum family. The Court of Appeals concluded that Timothy McCollum proved a prima facie case of sex discrimination, but that the prima facie case was rebutted by evidence showing, in part, the Postmaster's antipathy toward the McCollum family, Appendix 13. R3-40-67.

C. Existence of Jurisdiction in the Court Below

Petitioners' applicable claims in the United States District Court for the Northern District of Georgia are based on 42 U.S.C. 2000e-16(c). The case was reviewed by the United States Court of Appeals for the Eleventh Circuit pursuant to 29 U.S.C. 1291.

REASONS FOR GRANTING THE WRIT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT PERSONAL ANIMOSITY BETWEEN THE SUPERVISOR AND COMPLAINING EMPLOYEES AND MEMBERS OF THE COMPLAINING APPLICANT'S FAMILY IS A LEGITIMATE NONDISCRIMINATORY REASON FOR EMPLOYMENT DISCRIMINATION SO AS TO REBUT PETITIONERS' PRIMA FACIE CASE OF SEX DISCRIMINATION.

Although the District Court found that none of the Petitioners made a prima facie case, the Court of Appeals disagreed as to Charlene McCollum and Timothy McCollum. Appendix 11, 13. The Court went on to hold, however, that such prima facie cases were rebutted by legitimate nondiscriminatory reasons articulated by respondent. Both the District Court and the Court of Appeals seemed strongly influenced by the obvious bad feelings between the Postmaster and the McCollum family. R3-40-82, Appendix 3, 11, 13.

Yet, as this Court has said, the type of reason which must be advanced by defendant after proof of a prima facie case is a legitimate one as well as a nondiscriminatory one. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). All too often persons involved in the litigaton and adjudication of Title VII cases pass quickly over the word "legitimate" and focus exclusively on the word "nondiscriminatory." The first requisite of legitimacy cannot be overlooked.

We submit that any reason based on a personality clash or any personal feelings of ill will cannot be a legitimate reason. This is of particular concern here since the District Court specifically held in its opinion, in dismissing Timothy McCollum's case, "With such personal discord between Postmaster Howard on the one hand, and the McCollum family on the other, Postmaster Howard could not be faulted if his personal dislike for the family influenced his employment decision." R3-40-82. A federal managerial official must not let his personal

feelings of animosity toward an employee or applicant, let alone a member of the employee's or applicant's family, dictate his judgment on personnel decisions. He must base his decisions on qualifications and performance, not his personal relationships.

The Postmaster's attitude toward Charlene McCollum is different from his attitude toward many of the other females in the Rome Post Office. Indeed in the cases of Tony and Timothy McCollum, those petitioners point to preferential treatment of certain female employees. It is the contention of all three petitioners that the favored female employees behave in accordance with Mr. Howard's stereotyped feelings of how females should behave. He makes his views obvious with his comment in Tony McCollum's administrative hearing that he has more female than male rural carrier substitutes because "It's almost impossible to get a man because he has to make a living." Petitioners' Trial Exhibit 31, p. 138.

Even with regard to the legitimate reasons articulated by respondent for his actions against Charlene McCollum, petitioners may show pretext "either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 716 (1983) quoting *Burdine, supra.* Petitioners submit that the disparity in treatment of petitioners and the other employees discussed earlier herein and the involvement of the Postmaster's personal feelings in his managerial decisions show that his proffered explanation is not worthy of credence.

With regard to Timothy McCollum, the legitimacy of the proffered reason is additionally suspect since the Postmaster advanced four different reasons on various occasions, in testimony and in written form. He stated that he did not hire Timothy McCollum because he falsified his application, a reason stated by Mr. Howard's superiors, the Atlanta Sectional Center and the Office of the Postmaster General not to be appropriate, and a reason obviously not accepted by Mr. Howard's superiors since Timothy McCollum remained on hiring registers. R3-40-63, 64.

Mr. Howard also said that he did not hire Timothy McCollum because he was impossible to work with or around, a decision Mr. Howard based solely on his feelings about Vickie Dorsey, not Timothy McCollum. R13-631-636.

Mr.Howard also relied on his alleged feeling that hiring Timothy McCollum would have resulted in too many members of one family working at the Rome Post Office. Yet this is not in violation of any Postal regulation or statute, and there were cases other than the McCollums of relatives working in the Rome Post Office. R3-40-67.

With regard to the alleged reason of Timothy McCollum failing to respond to a call-in notice, this was admittedly not a reason since Mr. Howard later testified that he would not have hired Timothy McCollum even if he had responded to the call-in notice which allegedly was sent to him. R3-40-65, 66.

The Court of Appeals correctly stated that personal animosity "is not proscribed by Title VII." Appendix 11. Petitioners do not say that it is. Petitioners merely say that it should not be accepted by the Courts as a legitimate nondiscriminatory reason sufficient to rebut a prima facie discrimination case. It is nondiscriminatory; however, it is certainly not legitimate.

II.

THE DISTRICT COURT AND THE COURT OF APPEALS ERRED IN DETERMINING THAT PETITIONER TONY McCOLLUM DID NOT MAKE A PRIMA FACIE CASE OF SEX DISCRIMINATION AND RETALIATION.

The District Court found that Tony McCollum failed to make a prima facie case of sex discrimination because he did not show that he was treated differently from comparable female employees. The Court of Appeals agreed. Appendix 13. The District Court found that two female employees comparable to Mr. McCollum, June Moyer and Dorothy Hubbard, were both ultimately assigned substitutes. R3-40-80. This is not entirely correct and does not deal with all the comparable

female employees. The District Court stated elsewhere in its opinion that Dorothy Hubbard served a vacant route for approximately eight months without a substitute, except for a two or three day period when she was sick. R3-40-48. Thus she was not ultimately assigned a substitute on a regular basis as was Tony McCollum. The District Court also recognized at R3-40-48, 49 that another female rural carrier, Faye Evans, served a vacant route for five months and was assigned a substitute only after three and one-half months and only then upon her request. With regard to June Moyer, while the record reflects that she was assigned a substitute, it does not reflect how long she served before being assigned a substitute.

Thus the two female employees who can most directly be compared with Tony McCollum were treated decidedly better than he was from the point of view of being able to earn overtime pay.

With regard to having or not having a two-day weekend once a substitute was assigned, the record reveals that when Faye Evans did receive a substitute, she had Saturday as an off day, as did June Moyer when she received a substitute. R3-40-49. Unlike Tony McCollum, these two female employees did have a normal two-day weekend.

With regard to the letter of warning, both Courts held that Tony McCollum did not make a prima facie case because he did not show that women were treated more favorably than he was. Petitioner respectfully urges that he did make such a showing. The evidence already cited shows that several female rural carriers were treated more favorably than Mr. McCollum concerning opportunities to make overtime pay and ability to have a normal weekend rather than two non-consecutive off days. It is also submitted that Dorothy Hubbard was hired as an emergency substitute by Mr. Howard some years ago and still remains employed despite the fact that she has twice failed the examination for substitute rural carrier. R13-736. When her government driver's license was suspended as a result of her being at fault in an automobile accident, the Postmaster drove her around her route so that she could deliver it. She thus did not lose any pay as a result of the suspension. R13-738. This situation occurred in the face of the

Postmaster's stated position that suspending a carrier's driver's license when the carrier is determined to be at fault in an automobile accident is disciplinary action and results in lost pay to the carrier. Petitioners' Trial Exhibit 104, pp. 432, 433.

Both Courts found that Tony McCollum did not prove a prima facie case on the retaliation issue because the Postmaster stated that he did not know of Mr. McCollum's representation of his mother in her discrimination complaints. R3-40-79. Yet this is evidence which should be considered on the issue of whether respondent rebutted the prima facie case. The causal connection between the protected act and the retaliatory action may be shown by demonstrating that the retaliatory action "followed the protected activity so closely as to justify an inference of retaliatory motive." *Womack v. Munson*, 619 F.2d 1292, 1296, fn. 6 (8th Cir. 1980). See also to the same effect *McCarthy v. Cortland County Community Action Program*, 487 F.Supp. 333 (N.D.N.Y. 1980). With Tony McCollum's representation of his mother occurring in March and April 1981, with the Postmaster becoming involved in the process in April and May 1981 and with the adverse action occurring in May 1981, petitioners contend that the causal connection has been established. As the District Court apparently agreed, the other elements of a prima facie retaliation case, participation in a Title VII proceeding and subsequent adverse action, were shown by Tony McCollum. *Slotkin v. Human Development Corp. of Metropolitan St. Louis*, 454 F.Supp. 250 (E.D. Mo. 1978).

In view of the District Court's expressed belief that the Postmaster did not know of Mr. McCollum's participation in his mother's cases, one may wonder whether there is any benefit to petitioner in arguing whether that factor is to be considered as part of petitioner's prima facie case or as part of respondent's rebuttal of that case. The benefit is seen in the District Court's statement in its opinion with regard to Tony McCollum's case that "The issue of pretext, or whether the challenged action occurred for the employer's stated reason, is not before the Court unless the plaintiff states a prima facie case." R3-40-81. If the District Court felt that the petitioner made a prima facie case, it would have evaluated Mr. Howard's testimony in light of Mr. McCollum's evidence on pretext, which the Court apparently did

not consider. This may well have resulted in a different interpretation by the District Court of such testimony.

The District Court was influenced in its determination against a prima facie case by the fact that the problems between Mr. McCollum and Mr. Howard dated back to 1978, well before any protected activity by Tony McCollum. Yet the relationship between the two since 1978, while not good, did not lead to such significant overt acts as complained of until immediately after Tony McCollum's participation in his mother's discrimination cases. It is no defense to sex discrimination or retaliation charges to say that the defendant is influenced by additional factors aside from sex or retaliation. It is enough for Tony McCollum to show that sex or retaliation was a factor influencing the Postmaster's treatment of him. *Bibbs v. Block*, 749 F.2d 508 (8th Cir. 1984).

CONCLUSION

For the foregoing reasons, it is urged that the lower courts' decision as to rebuttal of petitioners' prima facie cases was contrary to the proper interpretation of this Court's decisions and therefore it is respectfully submitted that this Court should grant the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

WILLIAM D. MALLARD, JR.
MALLARD & MINOR
2900 Chamblee-Tucker Rd.
Building 6
Atlanta, Georgia 30341
(404) 457-9077
Attorney for Petitioners